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CASE NO. 82-815

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

In Re: WILLIAM LEE KOVACS,
Debtor,

STATE OF OHIO,
Petitioner-Appellant,

v.

WILLIAM LEE KOVACS, d/b/a, B & W Enterprises; Hamilton Industrial Real Estate Company; Resort Rentals; and Whitco Enterprises,
Respondent-Appellee.

On Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

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BRIEF IN OPPOSITON TO PETITION FOR WRIT OF CERTIORARI

HARRY M. HOFFHEIMER
900 Tri-State Building
Cincinnati, Ohio 45202
Telephone: (513) 852-6023
Counsel of Record for Respondent

WILLIAM H. EDER JR.
STEVE WILLIAMS
Co-Counsel for Respondent

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether, as a result of the decision of the lower court determining that the debtor's obligations under the injunction obtained by the state of Ohio are dischargeable pursuant to 11 U.S.C. § 727 (b), a case or controversy exists between the parties as required by Article III of the Constitution of the United States in order to confer jurisdiction on this Court to grant the Petition for Writ of Certiorari?

2. Whether the court below erred in ruling that the state of Ohio's efforts to reach the debtor's post-petition personal earnings in order to satisfy a pre-petition judgment issued by a state court were not exempt from the automatic stay provisions of 11 U.S.C. § 362 (a)?

COUNTERSTATEMENT OF STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves initially an interpretation of Article III of the Constitution of the United States and a determination of whether a case or controversy exists between the parties at this time so as to provide this Court jurisdiction to grant the state of Ohio's Petition for Writ of Certiorari. Article III of the Constitution of the United States is set forth in Appendix "A" hereto. Additionally, this case involves an interpretation of 11 U.S.C. § 362 and a determination of whether the bankruptcy court erred in ruling that the state of Ohio's efforts to reach the debtor's post-petition personal earnings in order to satisfy a pre-petition judgment were not exempt from the automatic stay provisions of Section 362 (a) of the Bankruptcy Code. The provisions of 11 U.S.C. § 362 are set forth in Appendix "H" of the Petitioner's Appendices.

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COUNTERSTATEMENT OF THE CASE

The state of Ohio filed suit in the Butler County Court of Common Pleas, Case No. CV-76-09-0834, on September

29, 1976, alleging that the debtor, the Chem-Dyne Corp. and other entities had violated the environmental laws and regulations of Ohio. The debtor, as well as other defendants, executed a Stipulation and Judgment Entry which was filed in that case on July 18, 1979. (Appendix "G" of Petitioner's Appendices.) While denying any liability on the part of any of the defendants for violation of Ohio's environmental laws, the Stipulation and Judgment Entry, in summary, required all defendants to do three things: (1) stop polluting; (2) clean up any existing pollution at the Chem-Dyne facilities; and (3) pay $75,000 to the Division of Wildlife, Ohio Department of Natural Resources.

The state of Ohio subsequently filed a motion in the Butler County Court of Common Pleas seeking the imposition of a receiver over the assets of the debtor and other defendants and, on February 4, 1980, that court entered an order appointing Jack Zettler as receiver and, *inter alia*, ordering the debtor to turn over to the receiver all his non-exempt assets. (Appendix "E" of Petitioner's Appendices.)

Debtor William Lee Kovacs filed a petition for reorganization under Chapter 11 of the Bankruptcy Code on July 17, 1980. Realizing that the cooperation and vote of the governmental environmental agencies would be required in order to have any feasible plan of arrangement approved, and that such cooperation and vote would not be forthcoming, Kovacs filed an application to convert to straight bankruptcy under Chapter 7 of the Bankruptcy Code and an order adjudicating the debtor a bankrupt and directing bankruptcy was entered on September 2, 1980. Soon thereafter, on September 12, 1980, without applying for relief from the automatic stay provisions of 11 U.S.C.

§ 362, the state of Ohio filed a motion in the Butler County Court of Common Pleas for an order directing a hearing to determine the existence of post-petition assets and earnings of the debtor in order to require the debtor to pay a portion of his post-petition personal earnings to the state court appointed receiver in order to satisfy the obligations of the July 18, 1979 Stipulation and Judgment Entry.

Kovacs then filed a motion for a specific stay on September 19, 1980, seeking an order preventing the state of Ohio from obtaining his post-petition personal earnings until such time as the issue of dischargeability of his obligations under the July 18, 1979 Stipulation and Judgment Entry was decided. On December 31, 1980, the bankruptcy court entered its decision granting the debtor's motion and staying the state of Ohio from proceeding further in the state court in its efforts to levy on post-petition personal earnings of the debtor. (Appendix "D" of Petitioner's Appendices.) That decision subsequently was affirmed by the United States District Court for the Southern District of Ohio (Appendix "C" of Petitioner's Appendices) and by the United States Court of Appeals for the Sixth Circuit. (Appendix "A" of Petitioner's Appendices.) It is from that decision of the Sixth Circuit that the state of Ohio has filed its Petition for Writ of Certiorari with this Court.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

1. Since this action began, both the bankruptcy court and the district court ruled that the debtor's obligations to the state of Ohio are dischargeable under 11 U.S.C. § 727 (b). For that reason, no case or controversy exists between the parties, so that the question on which this appeal is based has become moot.

2. No important question of federal law deserving this Court's consideration is presented.

3. No conflict exists between the decision below and other circuits concerning the issue raised in this case.

4. The decision below requires no intervention of this court in the exercise of its supervisory powers.

I. NO CASE OR CONTROVERSY CURRENTLY EXISTS BETWEEN THE PARTIES, WITH THE RESULT THAT THE INSTANT CASE HAS BEEN RENDERED MOOT.

On October 20, 1980, the Petitioner filed a complaint to determine the dischargeability of the debtor's obligations under the injunction issued by the state court. As the state of Ohio admits in a footnote on page 17 of its Petition, the bankruptcy court, on March 30, 1982, entered a final judgment entry in favor of the debtor based on its decision of February 23, 1982, holding that the obligations of the debtor under the state court injunction were dischargeable in bankruptcy. For the court's convenience, a copy of that decision is included herewith as Appendix "B." On September 17, 1982, the district court

entered its decision affirming the bankruptcy court's determination that the debtor's obligations under the injunction were dischargeable in bankruptcy. A copy of that unreported decision is included herewith as Appendix "C".

> The exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy. As the Court noted in *North Carolina* v. *Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 404, 30 L.Ed.2d 413 (1971), a federal court has neither the power to render advisory opinions nor "to decide questions that cannot affect the rights of litigants in the case before them." Its judgments must resolve " 'a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.' " *Ibid.*, quoting *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 241, 57 S.Ct. 461, 464, 81 L.Ed. 617 (1973). As the Court noted last Term, in an opinion of Mr. Justice Brennan, *Steffel* v. *Thompson*, 415 U.S. 452, 459 n. 10, 94 S.Ct. 1209, 1216, 39 L.Ed.2d 505 (1974): "The rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed. See, *e.g.*, *Roe* v. *Wade*, 410 U.S. [113,] 125, 93 S.Ct. 705, 713, 35 L.Ed.2d 147 [(1973)]; *SEC* v. *Medical Comm. for Human Rights*, 404 U.S. 403, 92 S.Ct. 577, 30 L.Ed.2d 560 (1972); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36 (1950)."

Preiser v. *Newkirk*, 422 U.S. 395, 401, 95 S.Ct. 2330, 2334, 45 L.Ed.2d 272 (1975).

The district court has ruled that the debtor's obligations under the state court injunction are dischargeable under 11 U.S.C. § 727. Consequently, the state of Ohio would be unable to seek to collect the post-petition personal earn-

ings of the debtor even if the decision of the Sixth Circuit were reversed by this Court. As a result, there currently is no dispute between the parties concerning the issues decided by the court below, nor is there any specific relief which could be granted the Petitioner in the instant case.

Respondent respectfully submits, additionally, that this matter should not be heard under the "capable of repetition, yet evades review," standard. The facts of this case are so unique that they preclude the Petitioner from confronting a similar instance in the future, nor do they suggest that some governmental agency will always be faced with similar issues. *See, Roe* v. *Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147, reh. den. 410 U.S. 959, 93 S.Ct. 1409, 35 L.Ed.2d 694 (1973). The Respondent is aware of no case which has reached this Court on Petition for Writ of Certiorari involving the following facts in sequence: (1) the granting of a motion for a specific stay pursuant to Section 362; (2) a decision that the obligations of the debtor under the judgment stayed are dischargeable, and (3) a Petition for Writ of Certiorari to this Court concerning the granting of the Section 362 stay. Additionally, the record below is devoid of any instances in which the Petitioner has sought to obtain post-petition personal earnings for the purpose of satisfying a pre-petition injunction from an individual debtor who has sought relief under Chapter 7 of the Bankruptcy Code.

The case below has become moot, and should be remanded to the Court of Appeals with directions to vacate the judgments of the district court and the bankruptcy court and to remand the case for dismissal in accordance with *Great Western Sugar Co.* v. *Nelson,* 442 U.S. 92, 99 S.Ct. 2149, 60 L.Ed.2d 735 (1979).

II. NO IMPORTANT QUESTION OF FEDERAL LAW DESERVING THIS COURT'S CONSIDERATION IS PRESENTED BY THE DECISION BELOW.

It is important initially to outline what this case does not involve. It does not involve a corporate debtor or business reorganization under Chapters 11 or 13 of the Bankruptcy Code, but rather involves a Chapter 7 proceeding for an individual debtor. This case does not involve that portion of the July 18, 1979, Stipulation and Judgment Entry requiring the debtor to stop polluting at the Chem-Dyne facilities, nor does it involve that portion of the Stipulation and Judgment Entry requiring the debtor to pay $75,000, which the state of Ohio concedes constitutes a money judgment at a footnote on page 2 of the Petition for Writ of Certiorari. Rather, this case involves the efforts of the state of Ohio to obtain personal earnings acquired by an individual debtor subsequent to the filing of a Chapter 7 liquidation petition for relief under the Bankruptcy Code, with the record containing no evidence that the amount the state might receive would be of any benefit in abating any existing pollution or, in fact, would justify the cost of the state's efforts to collect those personal earnings.

The state of Ohio, in its primary argument, seeks to leap from a consideration of whether a judgment by the Sixth Circuit staying Petitioner's efforts to obtain post-petition personal earnings of the debtor in order to satisfy a pre-petition judgment is worthy of this Court's review to a determination that the decision below should serve as a springboard for a comprehensive review, examination and decision by this Court of the Congressional intent, history, and specific wording of the provisions of 11 U.S.C.

§ 362. Such an approach would negate the underlying philosophy of the granting of Petitions for Writ of Certiorari, which is that the granting of such petitions is a matter of sound judicial discretion and not one of right on the part of the Petitioner. United States Supreme Court Rule 17.1.

In fact, the decision below is one which is extremely limited in its issues, its holding and its effect, whether that effect be future interpretations of 11 U.S.C. § 362 or whether that effect be upon the enforcement by the state of Ohio of its police power and its environmental laws.

The Petitioner continues throughout the Petition for Writ of Certiorari to assert, as it did on Page 8, that "state police power enforcement actions are not subject to the automatic stay . . . " That simply is not true. What is true is that enforcement of a governmental unit's police or regulatory power, *other than the enforcement of a money judgment,* is not subject to the automatic stay provisions of Section 362. What the lower court decided, contrary to the assertions of the Petitioner, is that the state of Ohio was attempting to enforce a money judgment against the debtor. It is for that reason, in a separate but related matter, that the District Court for the Southern District of Ohio ruled that the debtor's obligations under the July 18, 1979 Stipulation and Judgment Entry are dischargeable in bankruptcy. (Appendix C)

The state of Ohio spends considerable effort contrasting individual cases in an effort to defend its assertion that the courts have interpreted the statute at issue, 11 U.S.C. § 362, in such a way as to result in uncertainty rather than clarity. The citations and arguments by the Petitioner are totally misleading.

Both *In re Hillsdale Foundry Co.*, 2 C.B.C. 542 (Bkrtcy. W.D. Mich. 1974) and *In re Canarico Quarries, Inc.*, 466

F.Supp. 133 (D.P.R. 1979) involve the issue of the automatic stay under the previous Bankruptcy Act and not the Bankruptcy Reform Act of 1978, and, further, both involve the issue of whether a debtor may continue operation in violation of the state's pollution laws. There is no issue in this case of whether the debtor may continue to operate in violation of the state's pollution laws.

The state of Ohio then inaccurately contrasts two decisions concerning the automatic stay provisions of § 362 as they pertain to proceedings before the National Labor Relations Board. *In re Theobald Industries, Inc.*, 16 B.R. 537 (Bkrtcy. D.N.J. 1981) specifically issued its ruling on the basis of Section 105 (a) of the Bankruptcy Code and not on Section 362. Further, the court noted there that the proceedings sought to obtain pecuniary advantages and therefore affected the estate of the debtor and not the protection of the public safety and health. The court in *National Labor Relations Board* v. *Evans Plumbing Co.*, 639 F.2d 291 (5th Cir. 1981), while concluding that an enforcement proceeding by the NLRB on a charge of unfair labor practices was exempt from the automatic stay provisions according to § 362 (b) (4), noted that their decision would allow injunctive relief and an entry of judgment for back pay. The court continued, however, and stated that "should it be necessary to enforce the judgment for back pay, a different question would be presented. We express no opinion as to whether an action to execute or enforce a money judgment would be exempt from the automatic stay." *Id.*, at 293. Respondent respectfully submits that there is no substantive difference between an action to enforce a judgment for backpay and an action to seek the debtor's post-petition personal earnings in satisfaction of a pre-petition judgment.

The state of Ohio also compares two decisions which

concern the state's efforts to revoke a debtor's liquor license, again erroneously suggesting that the decisions may cause confusion as to the meaning of § 362. *In re Mason,* 18 B.R. 817 (Bkrtcy. W.D. Tenn. 1982) held that the action of the State of Tennessee to revoke a liquor license of an operating business was not stayed under the Bankruptcy Reform Act of 1978 inasmuch as the state was not attempting to collect a pre-petition debt, *i.e.,* was not attempting to collect money, but then went forward and invoked its powers under Section 105 of the Bankruptcy Code to stay the state from proceeding. *Colonial Tavern, Inc.* v. *Bryne,* 420 F. Supp. 44 (D.Mass. 1976) did not even deal with Bankruptcy Reform Act of 1978, but was decided some three years before the effective date of the statute at issue herein.

Finally, both *In re Jacoosmeyer,* 13 B.R. 298 (Bkrtcy. W.D. Mo. 1981) and *Donovan* v. *TMC Industries, Ltd.,* 20 BR 997 (N.D. Ga. 1982) involved the application of the automatic stay to reorganizations of businesses, and did not address the issue of whether an individual debtor can be required to pay money in satisfaction of a pre-petition judgment, when the money sought to be obtained by the state is limited to post-petition personal earnings.

Apart from the fact that the Petitioner inaccurately cited the various cases to establish a conflict, this action is so limited in its factual parameters and effects that it does not present an important question of federal law deserving this Court's time and consideration. There is no evidence in the record that the denial of the state of Ohio's efforts to obtain a portion of the debtor's post-petition personal earnings hindered or prevented the state of Ohio from prohibiting future pollution by the debtor, nor is there any evidence that, were the state successful in obtaining those post-petition personal earnings, the amount of money would assist in any manner the state in cleaning up any

pollution which might exist. Instead, as suggested by Judge Spiegel in rendering his decision for the United States District Court, the state appears to be attempting to punish the debtor and, in the process, subverting the purpose of the Bankruptcy Code. Additionally, as Judge Spiegel pointed out, the state could have applied for relief from the automatic stay under the provisions of § 362 (d) had it been able to show that the stay was impeding the enforcement of its police and regulatory powers. (Appendix "C" of Petitioner's Appendices at 14.)

This case is limited to the sole issue of whether the state of Ohio's efforts to obtain money from the debtor to satisfy a pre-petition judgment constitutes an effort by the state to enforce a money judgment. All three lower courts have ruled that it does constitute an effort to enforce a money judgment and, for that reason, is subject to the automatic stay provisions of § 362 (a). Respondent is unable to find any other cases interpreting § 362 which deal with the issue of whether post-petition personal earnings of the debtor can be taken by a governmental unit in order to satisfy a judgment obtained by that governmental unit against the debtor prior to the filing of the debtor's petition in bankruptcy. Nor is there any indication that the cardinal facts of this case are such as will likely be repeated in such frequency as to involve an important question of federal law.

Finally, Respondent suggests that this Court's decision in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line* Co., 454 U.S. 1029; 102 S.Ct. 564; 102 S.Ct. 1270; 102 S.Ct. 1421; 102 S.Ct. 2858 (1982), and the subsequent staying of that judgment by this Court until December 24, 1982, significantly reduces any importance this case might have. Although the essence of the Court's decision in *Northern Pipeline Construction Co.* dealt with the inter-

play of Article III of the Constitution and the Bankruptcy Reform Act of 1978, there is no assuredness that substantive changes in the bankruptcy laws will not be made by Congress prior to December 24, 1982, with the result that any decision rendered herein would be of no assistance in providing future guidance for lower courts in interpreting and effect and meaning of § 362 of the Bankruptcy Code.

III. NO CONFLICT EXISTS BETWEEN THE DECISION BELOW AND OTHER CIRCUITS CONCERNING THE ISSUE OF THIS CASE.

The state of Ohio asserts that the decision of the Sixth Circuit below conflicts with the decision of the Fifth Circuit in *Securities and Exchange Commission* v. *First Financial Group of Texas,* 645 F.2d 429 (5th Cir. 1981), and further asserts that the factual patterns of both cases are virtually identical. Neither assertion is accurate or incisive and reflects the failure of the Petitioner to accept the purposes of the exceptions to the automatic stay provisions of 11 U.S.C. § 362 (a) contained in 11 U.S.C. § 362 (b) (5).

The issue in *First Financial* was whether the district court, during the course of a continuing civil enforcement action which was not argued by the debtor to be subject to the automatic stay of 11 U.S.C. § 362 (a), could appoint a temporary receiver notwithstanding the automatic stay against "any act to obtain possession of property" of the debtor pursuant to 11 U.S.C. § 362 (a) (3). The issue in this case is whether the state of Ohio's attempt to collect post-petition personal earnings of the debtor to satisfy a pre-petition judgment granted by a state court was subject to the automatic stay provisions of 11 U.S.C. § 362 (a).

The Fifth Circuit in *First Financial* ruled that the ap-

pointment of a receiver was a necessary ancilliary form of relief in the civil enforcement action in order to prevent future violations of the law and wrongdoings and in order to insure that the corporate debtor's assets would not be diverted or wasted to the detriment of the corporate debtor's creditors. That result was obtained when the state court appointed a receiver of the debtor's asset in the instant case on February 4, 1980. The appointment of a receiver in *First Financial* prevented future violations of law and did not require payment of monies by the debtor; there is no contention that the debtor in this case has violated any environmental laws or regulations since the appointment of a receiver on February 4, 1980. The Fifth Circuit in *First Financial* found that the appointment of a temporary receiver was a *necessary* ancilliary form of relief in order to afford the SEC the injunctive relief to which it was entitled; there has been no finding, nor evidence presented to support any finding, that the collection by the state of Ohio of a portion of the debtor's post-petition personal earnings is a *necessary* ancilliary form of relief in order to grant the state of Ohio's injunctive relief.

There is no conflict between a decision which allows the appointment of a receiver over a debtor's assets in order to prevent future violations of the law and dissipation of the debtor's estate and a decision which denies a governmental agency, without relief from the automatic stay provisions of 11 U.S.C. § 362, the right to obtain money from the debtor in satisfaction of a pre-petition judgment. In essence, the Fifth Circuit's decision properly allowed the governmental agency to implement injunctive relief by preventing future violations of the law through the appointment of a receiver, while the efforts of the state of Ohio to obtain post-petition income from the debtor in this case bears no relationship to the injunctive relief of

forbidding future violation of the state's environmental laws and regulations by the debtor. The distinction was noted by the Sixth Circuit in *In re Mansfield Tire & Rubber Co.*, 660 F.2d 1108 (6th Cir. 1981), where the court, after holding that the state of Ohio's administration of the workers' compensation claims of the debtor's employees were not subject to the automatic stay of 11 U.S.C. § 362, noted that "[t]he insurance fund, not the debtor's estate, pays the claims for which the employer has paid the premium." *Id.* at 1112-13. In this instance, the state of Ohio seeks the payment of money from the debtor.

The Petitioner argues additionally that the decision below conflicts with previous uniform decisions of the various circuits concerning the definition of "money judgment." That assertion ignores the congressional history of the Bankruptcy Reform Act of 1978 so often cited by the Petitioner. The congressional committee reports explaining the exemption from the 11 U.S.C. § 362 (a) automatic stay contained in 11 U.S.C. § 362 (b) (5) cited two examples wherein governmental actions had been held subject to the automatic stay and would not be stayed under Section 362 as contained in the Bankruptcy Code. Both cases involved efforts of a governmental agency to prevent future violations of state laws, in one instance being continued violation of a state's environmental laws and in the other continued violations of a state's consumer protection laws. No issue exists in the instant matter concerning continued violations of the state's environmental laws by the debtor.

Additionally, the state's argument fails to acknowledge that, as a consequence of the specific purposes and goals of the federal bankruptcy laws, the definitions assigned to legal terminology by other courts are not binding upon the bankruptcy courts. *See, e.g., Matter of Gentile*, 16 B.R.

381 (Bkrtcy. S.D. Ohio 1982); *In re Miller*, 17 B.R. 773 (Bkrtcy. N.D. Ohio 1982), both of which state unequivocably that the meaning of "alimony" and "support and maintenance" assigned by non-bankruptcy courts are not controlling upon a bankruptcy court in determining whether an obligation is non-dischargeable as support and maintenance pursuant to Section 523 of the Bankruptcy Code. The same thrust is found in those numerous cases which, in deciding whether a governmental agency is exercising its police powers, distinguish between those cases in which the governmental agency's interest is a pecuniary one and those in which the governmental agency's interest is one involving public safety considerations, all of which are extensively discussed by the court in *Donovan* v. *TMC Industries, Ltd., supra.*

There is no conflict, therefore, between the decision below and the Fifth Circuit's decision in *First Financial*, nor is there any conflict involving the definition of "money judgment," as that phrase is contained in 11 U.S.C. § 362 (b) (5).

IV. THE DECISION BELOW REQUIRES NO INTERVENTION OF THIS COURT IN THE EXERCISE OF ITS SUPERVISORY POWERS.

In its final argument, the state of Ohio asserts that the Sixth Circuit, in refusing to allow the state of Ohio to obtain the debtor's post-petition personal earnings in satisfaction of the pre-petition state court injunction, so seriously violated the policy choice made by Congress that governmental agencies be able to enforce their police and regulatory powers free from the automatic stay that this Court should intervene pursuant to its supervisory authority over

bankruptcy courts. That argument is erroneous both as to the decision of the Sixth Circuit below and as to the Congressional intent in enacting the § 362 (b) (5) exception to the automatic stay provisions of § 362 (a).

Initially, contrary to the assertion of the Petitioner that the courts below admitted that the state of Ohio was not seeking to enforce a money judgment, the Sixth Circuit stated unequivocably "that the state of Ohio in its state court proceedings was seeking what in essence amounted to a money judgment against Kovacs, which was properly subject to the automatic stay." (Appendix A of Petitioner's Appendices at 6.) Indeed, the Sixth Circuit additionally found that the state court order appointing the receiver could not be distinguished in substance from a money judgment because of its requirement that the receiver obtain all non-exempt assets of the debtor, as well as any sums of money which would become payable to the debtor in the future.

Essentially, the state fails to accept that a court order may be both an injunction and a money judgment. There is no difference in substance between the efforts of the state of Ohio to require the debtor to pay money to the receiver and the requirement of the July 18, 1979 Stipulation and Judgment Entry that the debtor pay $75,000 to the Ohio Department of Natural Resources, a portion of the order which the state of Ohio concedes constitutes a money judgment. (Petition for Writ of Certiorari at page 2.)

The Petitioner's argument that the holding below is contrary to the intent of Congress in enacting 11 U.S.C. § 362 (b) (5) is equally erroneous. The two examples given in the House Report on the Bankruptcy Reform Act of 1978 concerning the exemptions from the automatic stay provisions are illustrative. The first example involved the imposition of a stay which prevented the State of

Maine from closing a plant which was then violating the state's environmental laws. The second example involved the imposition of the stay preventing the state of Nevada from obtaining an injunction to prevent continued violation of anti-fraud consumer protection laws. *See, House Report, No. 95-595,* 95th Cong., 1st Sess. (1977), accompanying H.R. 8200, at p. 155-156.

As noted by the Sixth Circuit in *In re Mansfield Tire & Rubber Co.*, 660 F.2d 1108 (6th Cir. 1981), the purpose of the § 362 (b) (5) exemption was to allow governmental action which would prevent or stop violation of the state's police or regulatory laws, not to allow states to obtain money from the debtor in furtherance of the exercise of its police power or regulatory power. In the instant case, Ohio is not seeking to prevent the debtor from further violating its environmental laws, nor is the state seeking the imposition of a receiver in order to insure against future violations of its laws by the debtor. Those goals were accomplished almost three years ago with the appointment of a receiver by the state court on February 4, 1980.

The state of Ohio expends additional energy arguing that the Sixth Circuit decision was erroneous in that it did not enter a "meticulous balancing of the public interests and the interests of the bankruptcy estate . . . " (Petition for Writ of Certiorari at 26). That argument is of no merit because the decision below was that the state of Ohio was seeking to enforce a money judgment in violation of the automatic stay provisions of § 362 (a), and was not based on the authority of the bankruptcy court to grant a stay pursuant to 11 U.S.C. § 105.

Inasmuch as the decision below both enforced the Congressional intent behind the enactment of § 362 (b) (5) and properly applied the automatic stay provisions of § 362 (a),

there is no necessity or justification for the involvement of this Court pursuant to its powers of supervision over the bankruptcy courts.

CONCLUSION

The question on which this appeal is based has become moot, so that the Court should vacate the judgment of the Sixth Circuit and remand the case with instructions that the action be dismissed. In the alternative, this Court should not grant the Petition for Writ of Certiorari because the decision below is not in conflict with the decision of any other federal court of appeals on the same matter, nor is there any conflict between the decision below and any state court of last resort, nor is any important question of federal law deserving this Court's consideration presented, nor does the decision below so far depart from the usual course of judicial proceedings so as to require this Court to exercise its power of supervision.

Respectfully submitted,

HARRY M. HOFFHEIMER
900 Tri State Building
Cincinnati, Ohio 45202
Telephone: (514) 852-6023
Counsel of Record for Respondent

WILLIAM H. EDER JR.
STEVE WILLIAMS
Co-Counsel for Respondent

COUNTY OF HAMILTON)
) SS:
STATE OF OHIO)

AFFIDAVIT OF SERVICE

I, Steve Williams, an attorney in the office of Messrs. Wood, Lamping, Slutz & Reckman, a member of which, Harry M. Hoffheimer, is counsel of record for William Lee Kovacs, Appellee herein, depose and say that three copies of this brief in opposition to petition for writ of of certiorari were mailed pursuant to Supreme Court Rule 28.3 by United States mail, first-class postage prepaid this ..... day of December, 1982, to William J. Brown, Attorney General of Ohio, E. Dennis Muchnicki, Assistant Attorney General and Stephen J. Willey, Assistant Attorney General, all at State Office Tower, 30 East Broad Street, 17th Floor, Columbus, Ohio 45215; to John A. Garretson, 118 S. Broad Street, Hamilton, Ohio 45011, and to E. Hanlin Bavely, 604 Tri-State Building, Cincinnati, Ohio 45202.

Steve Williams
Co-Counsel for Respondent

Sworn to before me and subscribed in my presence this

—— day of December, 1982.

Notary Public

APPENDIX A

CONSTITUTION OF THE UNITED STATES

ARTICLE III.–THE JUDICIARY

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;–to all Cases affecting Ambassadors, other public Ministers and Consuls;–to all Cases of admiralty and maritime Jurisdiction;–to Controversies to which the United States shall be a Party;–to Controversies between two or more States;–between a State and Citizens of another State;–between Citizens of different States,–between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

APPENDIX B

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DISTRICT

Adversary File No. 1-80-0249
(Related Case No. 1-80-01499)

IN RE WILLIAM LEE KOVACS
dba/ B & W Enterprises, Hamilton Industrial Real Estate Company, Resort Rentals and Whitco Enterprises,

Debtor,

STATE OF OHIO, et rel.
WILLIAM J. BROWN,
ATTORNEY GENERAL OF OHIO, et al,

Plaintiff,

v.

WILLIAM LEE KOVACS, et al.

DECISION AND ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

(Filed February 23, 1982)

At Cincinnati, in said District, on the *23rd* day of February, 1982:

Defendant in this adversary proceeding is debtor in the related bankruptcy case. Defendant was a party to state

court litigation brought by the State of Ohio, on the relation of its Attorney General, director of Environmental Protection and Department of Natural Resources, which eventuated in an agreed Judgment Entry filed in the Butler County Court of Common Pleas. That Entry personally bound defendant to certain obligations. In the instant litigation, the plaintiff State of Ohio seeks a declaration that the obligations imposed upon defendant by the consent decree are non-dischargeable. It is to be noted that the complaint in this proceeding is not limited to the foregoing relief, but seeks in addition relief by way of an injunction against defendant and the trustee from taking any action to recover assets from the state court receiver or from interfering with that receiver in the performance of his duties.

The evidentiary record upon which this motion proceeds consists entirely of a stipulation entered into between the parties to which are attached Exhibits A through J. The following facts are found based upon the stipulation. Defendant and one Bruce Whitten were the chief executive officers of Chem-Dyne Corporation which was engaged in the business of brokering, hauling, storing, disposing and recycling of industrial and hazardous waste at a facility in Hamilton Ohio. The State of Ohio filed the above mentioned suit in Butler County Common Pleas Court against Chem-Dyne Corporation, other corporate entities, and Whitten and defendant, the latter being sued both as individuals and officers of Chem-Dyne. The gravamen of the complaint was that defendants had caused water pollution and a public nuisance, contrary to the laws of Ohio, by the manner in which they conducted their business. The litigation was terminated by a stipulation and Judgment Entry filed on July 18, 1979 which Entry was signed personally by defendant. The Judgment Entry ordered the

defendants, including defendant here, inter alia, to: refrain from causing water pollution; refrain from causing or allowing the emission of noxious exhalations or noisome or offensive smells; remove and dispose of all industrial waste and/or other wastes on the premises within twelve (12) months; and pay $75,000.00 to the Department of Natural Resources. Because defendants did not do what was required of them by the Judgment Entry, the State of Ohio sought appointment of a receiver to accomplish the requirements of the Judgment Entry. The court granted that motion and appointed a receiver. The order appointing the receiver established, inter alia, the receiver's authority and powers to carry into effect the obligations imposed upon defendant and the others by the Judgment Entry, and required defendant to cooperate with the receiver.

In its memorandum in chief (p.15) movant states the provisions of the Judgment Entry imposing obligations upon defendants which plaintiff here seeks to have declared non-dischargeable: to refrain from causing water pollution in violation of Chapter 6111; refrain from creating a nuisance by not causing or allowing the emission of noxious exhalations or noisome or offensive smells, to remove and dispose of all industrial and/or other wastes from the premises at 500 Ford Boulevard within twelve months from the signing of the order; and to make a certain payment to the Ohio Department of Natural Resources. (In its memorandum plaintiff says that the instant proceeding does not concern the obligation of defendant to pay a monetary penalty to the Division of Wild-life, since plaintiff concedes that that provision creates a right to payment which constitutes a claim, and therefore the last named injunctive provision is not, says the plaintiff, to be a subject of the present motion.) Furthermore, it is clear that the negative injunctions, to refrain from causing water

pollution etc. and to refrain from creating a nuisance etc. are mooted since defendant is not in possession of the premises, since a receiver has been installed there. This leaves as the real subject of the present motion the affirmative obligation imposed upon defendant by the Judgment Entry that he remove and dispose of all industrial and/or other wastes at the subject premises. It is plaintiff's position that this obligation is non-dischargeable as a matter of law. Its theory is that that obligation does not constitute a claim or debt susceptible to discharge under 11 U.S.C. § 727 (b), and a discharge extends only to debts and claims.

While the complaint in this proceeding to the extent here relevant is entitled Complaint to Determine Non-Dischargeability, the usual section of the Bankruptcy Code which comes into play when questions of dischargeability arise, 11 U.S.C. § 523, is not invoked by plaintiff. Instead, plaintiff appears to seek a declaration that the aforementioned affirmative obligation of the state court Judgment Entry will not be discharged by the discharge which may be granted to debtor in the related bankruptcy case.

As a relevant part of the background to the present initative of plaintiff State of Ohio, we note that in the related bankruptcy case of debtor, on October 31, 1980 there was entered a Decision (hereafter "Prior Decision") by this court on debtor's Motion for Specific Stay Order. In that Motion, debtor had sought to restrain proceedings brought by the State of Ohio in the Butler County Common Pleas Court designated to recover from debtor post-petition personal earnings. We granted that motion, holding that efforts to make such collection were within the stay provisions of 11 U.S.C. § 362. In our Decision, we said that: "We hold, therefore, that the State is estopped to deny that it is not seeking to enforce a money judgment against debtor." The District Court affirmed our Decision

(April 30, 1981), the Court making express mention with approval of the above quoted holding. We are informed that the State of Ohio is pursuing a further appeal to the Sixth Circuit Court of Appeals in that matter.

What is at stake in the present motion is whether defendant's bankruptcy will discharge the affirmative obligation imposed upon him by the Judgment Entry, that he remove and dispose of all industrial and/or other wastes at the subject premises. If plaintiff is successful here, it would be able to levy on defendant's wages, the action prevented by our Prior Decision, after defendant's bankruptcy case is closed and/or the stay of 11 U.S.C. § 362 as interpreted by our Prior Decision is no longer in force. The parties have crystallized the issue here in simple fashion, plaintiff stoutly insisting that the just identified affirmative obligation is not a monetary obligation, while defendant says that it is. The problem arises, of course, because it is not stated as a monetary obligation. Essentially for this reason plaintiff argues that it is not a monetary obligation. Yet the plaintiff in discussing the background for the Judgment Entry says that it expected that defendant would generate sufficient funds in his ongoing business to pay for the clean-up. Moreover, we take judicial notice that plaintiff sought discovery with respect to defendant's earnings, the matter dealt with in our Prior Decision, for the purpose of levying upon his wages, a technique which has no application other than in the enforcement of a money judgment. There is no suggestion by plaintiff that defendant can render performance under the affirmative obligation other than by the payment of money. We therefore conclude that plaintiff has a claim against defendant within the meaning of 11 U.S.C. § 101 (4), and that defendant owes plaintiff a debt within

the meaning of 11 U.S.C. § 101 (11). Furthermore, we have concluded that that debt is dischargeable.

In order for the debt to be nondischargeable, a provision with respect to it would have to be found within 11 U.S.C. § 523. An examination of that section indicates that it is § 523 (a) (7) which is relevant. There it is provided:

> "§ 523. Exceptions to Discharge.
>
> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt - - -
>
> (7) to the extent such debt is for a fine, penality, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss . . ."

It must be clear from what we have said above and without further discussion, that the significance to plaintiff of the affirmative obligation of the Judgment Entry is that defendant pay compensation to plaintiff for pecuniary loss, that occasioned by the necessity for the clean up. Discharge of such an obligation is not barred by the provisions of 11 U.S.C. § 523 (a) (7). Plaintiff therefore is not entitled to summary judgment, since it is not entitled to judgment as a matter of law as required by B.R. 756.

In reaching this conclusion we have found the decision *In re Tauscher*, 7 B.R. 918 (B.J., Wis. 1981) in its discussion of § 523 (a) (7) illuminating. In applying that section the court found a distinction between a money penalty which was found to be non-dischargeable, and back wages owed by the defendant which were found to be dischargeable.

Plaintiff with great industry has reviewed the legislative history of the Bankruptcy Code with respect to the definitions of "claim" and "debt", § 101 (4) and § 101 (11), for

the purpose of demonstrating that defendant's affirmative obligation under the Judgment Entry is not a "claim". That review culminates in a formulation by plaintiff that this follows because (1) there is no authority which creates in plaintiff a right to payment as an alternative remedy to debtor's compliance with the injunction of the Judgment Entry; and (2) that debtor's conduct which entitled plaintiff to injunctive relief was a "violation of law" not a "breach of performance" and debtors failure to comply with the injunction was a "contempt of court" not a "breach of performance." An essential part of the argument of the plaintiff is that defendant owes an obligation to plaintiff by reason of the injunction to perform the acts required by the injunction, and it could not substitute for that obligation to the State a payment of money to the State, and in order to qualify as a claim, such a right would have to exist. We are not persuaded by plaintiff's arguments. Plaintiff gives too inflexible a reading to the legislative history. Where, as here, plaintiff has itself treated its rights under the Judgment Entry as a right to payment, and in no way is it suggested that that right amounts to anything other than a right to payment, can we permit a party to hide behind words to avoid the plain thrust of the law.

Plaintiff's analysis of the case cited by defendant, *In re Button,* 8 B.R. 692 (B.J., W.D., N.Y., 1981) is both informative and inappropriate. *Button* held that a restitution order imposed as a condition of probation imposed for a criminal violation is not dischargeable in bankruptcy. Plaintiff urges that we deal with the matter before us in the same manner, as though defendant had been convicted of a crime. The law does not permit us to do that. Plaintiff seems determined to ignore the language of the District Court in its Opinion, Case No. C-1-81-59, April 30, 1981,

(D.C. S.D., Ohio, Western Division), affirming our Prior Decision where Judge Judge [sic] Spiegel said:

> "Finally, the Court is somewhat disturbed by its impression that the State is attempting to punish Mr. Kovacs for not complying with the 1979 Judgment, and in the process is subverting the purpose of the Bankruptcy Code.
>
> • • •
>
> *There are criminal sanctions which the State may invoke against Mr. Kovacs if he has violated environmental protection laws and regulations. The Bankruptcy Code may not be used as a substitute for such criminal sanctions.*" (Emphasis supplied.)

Plaintiff's motion is denied.

So ORDERED.

Dated: February 23, 1982

/s/BURTON PERLMAN
BURTON PERLMAN
U. S. BANKRUPTCY JUDGE

2/23/82 (alc).
Copies to:

E. Dennis Muchnicki, Esq.
Steven J. Willey, Esq.
Counsel for Plaintiff
State of Ohio
Assistant Attorney General
Environmental Law Section
30 East Broad Street, 17th Flr.
Columbus, Ohio 43215

William H. Eder, Jr., Esq.
Counsel for Defendant-Kovacs
900 Tri State Building
Cincinnati, Ohio 45202

John A. Garretson, Esq.
Counsel for Plaintiff-Zettler.
118 South Second Street
Hamilton, Ohio 45011

E. Hanlin Bavely, Esq.
Counsel for Defendant-Trustee
1107 Tri State Building
Cincinnati, Ohio 45202

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C-1-82-526

IN RE: WILLIAM LEE KOVACS, dba
B & W ENTERPRISES,

Debtor,

STATE OF OHIO, ex rel
WILLIAM J. BROWN, ATTORNEY
GENERAL OF OHIO,

Plaintiffs-Appellants,

vs.

WILLIAM LEE KOVACS, et al.,

Defendants-Appellees.

OPINION AFFIRMING BANKRUPTCY COURT'S DETERMINATION OF DISCHARGEABILITY

(Filed September 17, 1982)

SPIEGEL, J.:

This matter came before the Court for oral argument on appeal from a determination of dischargeability by Judge Burton Perlman of the United States Bankruptcy Court, Southern District of Ohio, Western Division. Having considered plaintiffs-appellant's brief and reply brief (docs. 2, 4) and defendant-appellees' reply (doc. 3), as

as well as the evidence and the arguments of counsel, we affirm the judgment of the Bankruptcy Court.

At issue is the dischargeability of an injunction obtained as part of a settlement agreement by the State of Ohio. The injunction, entered in the Court of Common Pleas of Butler County, July 18, 1979, required, *inter alia*, defendant Kovacs to remove and dispose of all hazardous materials stored at the Chem-Dyne premises in Hamilton County within one year. *State of Ohio ex rel Brown, et al.* v. *Chem-Dyne Corp., et al.*, Butler County Court of Common Pleas, Case No. CV-76-09-0834. Defendant Kovacs was chief executive officer of Chem-Dyne Corporation which was in the business of disposing of and recycling industrial and hazardous wastes.

Approximately six months after the injunction was entered, the State succeeded in its attempt to have a receiver appointed over the property and assets of, among others, William Kovacs and Chem-Dyne. Subsequently defendant Kovacs filed a petition for relief, initially under the arrangement provisions of Chapter 11 and later by application under the liquidation provisions of Chapter 7 of the Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 101 *et seq.* Kovacs was adjudicated bankrupt September 2, 1980.

On September 12, 1980, the State filed a motion in the Butler County Common Pleas Court for a hearing to determine the existence of any further assets of the debtor Kovacs. Defendant Kovacs requested and the Bankruptcy Court granted a stay of these state proceedings pursuant to the automatic stay provisions of 11 U.S.C. § 362. The Bankruptcy Court found that the State's purpose in bringing the state court action was to establish Kovac's post-petition earnings preliminary to seeking an order which would require that part of Kovacs' post-petition earnings be applied to the receiver's efforts to clean up the Chem-

Dyne facility. The State appealed to this Court which affirmed the action of the Bankruptcy Court. The State then appealed to the United States Court of Appeals for the Sixth Circuit which also affirmed, stating, "[w]e further concur with the conclusion of the bankruptcy court and the district court that the state of Ohio in its state court proceedings was seeking what in essence amounted to a money judgment against Kovacs." *In Re Kovacs,* Case No. 81-3320 (June 16, 1982).

In October, 1980 the State sought a declaration from the Bankruptcy Court that the obligation imposed upon Kovacs by the injunction to clean up the Chem-Dyne facilities was not subject to discharge pursuant to 11 U.S.C. § 727 (b). Judge Perlman denied the State's motion for summary judgment, finding the injunction subject to discharge.

In essence, the State's argument is that or[illegible] "claims" or "debts" are dischargeable in bankruptcy pursuant to 11 U.S.C. § 727 (b). "Debt" is defined by the Bankruptcy Reform Act as liability on a claim. 11 U.S.C. § 101 (11). "Claim" is defined as a "right to payment" or a "right to equitable remedy for breach of performance if such breach gives rise to a right to payment." 11 U.S.C. § 101 (4). In an extensive discussion of the legislative history, the State argues that Congress intended to make the dischargeability of rights to equitable remedies turn on the availability of alternative rights to payment. Because, according to the State, Kovacs' failure to comply with the injunction does not give rise to a right to payment under Ohio law, the injunction is not dischargeable (doc. 2). Plaintiff also asserts that the State is not seeking to compel payment from defendant Kovacs but rather to have the Butler County Common Pleas Court establish a new rate of clean-up more commensurate with Kovacs' changed financial condition (doc. 4).

Defendant Kovacs agrees that the key issue in determining whether an obligation under a state court order is a "debt" within the meaning of the dischargeability provisions of the Bankruptcy Act, is whether the debtor's estate can be compelled to pay money in compliance with the order. Defendant argues that the State is estopped from denying that it has no such right. Pointing to the State's motion in the Butler County Common Pleas Court for a hearing to determine Kovacs' post-petition income and employment status, defendant maintains that the State cannot on the one hand seek to compel payment from Kovacs and on the other hand argue that it has no right to such payment (doc. 3).

The Court accepts that the existence of an alternative right to payment determines whether an obligation to perform created by court order is dischargeable pursuant to 11 U.S.C. § 727 (b). *In re Newton,* 15 B.R. 708 (N.D. Ga. 1981); *In Re Button,* 8 B.R. 692 (W.D. N.Y. 1981). We also recognize that defendant has not clearly established that Ohio law provides for an alternative right of payment. Nevertheless, we conclude that, under the law of the case principles, we must accept the determination of the Sixth Circuit that the State was seeking what amounted to a money judgment against Kovacs. *In Re Kovacs, supra.*

Law of the case doctrine embodies the principle that a decision of the appellate court, unless properly set aside, should be followed at subsequent stages of the litigation in the interest of consistency and to avoid reconsideration of matters already settled. Although courts have the power to reconsider issues, *Messenger* v. *Anderson,* 225 U.S. 436, 444 (Holmes, J.), most courts state that reconsideration is justified only where there has been an intervening change in controlling law, new evidence has become available, there is a need to correct an obvious error, or to prevent

manifest injustice. *Petition of United States Steel Corp.*, 479 F.2d 489, 493-494 (6th Cir. 1973) *cert. denied* 414 U.S. 859. Federal district courts should be particularly cautious about ignoring the findings of controlling circuit courts. *Id.* at 493.

We find no cogent reason justifying reconsideration of the Sixth Circuit's determination in *In Re Kovacs, supra.* Plaintiff-appellant has cited to no change in the law or new evidence. Although counsel for plaintiff challenges the correctness of the Sixth Circuit's finding, we are not persuaded that there is error in that court's determination that the State was seeking a money judgment from Kovacs as an alternative to requiring Kovacs personally to perform the obligations imposed by the injunction. If there is error, it is certainly not obvious.

Finally, no injustice will result from our following the law of the case in this instance. On the contrary, the finding that the State was in fact seeking a money judgment from Kovacs and that consequently the injunction is dischargeable pursuant to 11 U.S.C. § 727 (b) is in harmony with the principles of rehabilitation underlying the Bankruptcy Reform Act of 1978. To find that the injunction is not dischargeable would subvert Congress' clear intention to give debtors a fresh start.

The Court, therefore, affirms the decision of the Bankruptcy Court.

So Ordered.

/s/S. ARTHUR SPIEGEL
S. Arthur Spiegel
United States District Judge